

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF
)	
)	
TYSON FOODS, INC., et. al,)	
)	
)	
Defendant.)	

MOTION TO INTERVENE BY THE CHEROKEE NATION

Comes now the Cherokee Nation, ex rel. A. Diane Hammons, the duly appointed and confirmed Attorney General of the Cherokee Nation, and hereby moves the Court to intervene in the above-captioned case. Pursuant to Fed. R. Civ. P. 24(a) the Cherokee Nation is entitled to intervention of right, as more fully set forth in the following memorandum of law which is attached and incorporated into this motion. Pursuant to Fed. R. Civ. P. 24(c) attached hereto is a Complaint setting out the claims for which intervention is sought.

Respectfully submitted,

/s/ A. Diane Hammons
A. Diane Hammons, OBA No. 10835
Attorney General
Assistant Attorney General
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74464
(918) 453-5000

**MEMORANDUM OF LAW IN SUPPORT OF CHEROKEE
NATION'S MOTION TO INTERVENE**

The Cherokee Nation is entitled to intervention of right in this case under Fed. R. Civ. P. 24(a).

Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24.

**I. THE NATION CLAIMS AN INTEREST RELATING TO THE IRW THAT
MAY, AS A PRACTICAL MATTER, BE IMPAIRED OR IMPEDED BY THE
DISPOSITION OF THE LITIGATION.**

The Nation's interest in this litigation has been recognized by all parties, and this Court.

The defendant poultry producers have asserted that, "the Cherokee Nation continues to own and to assert its authority over the lands and other natural resources granted by the treaties with the United States, including the natural resources of the IRW." Defendants Motion to Dismiss, p. 14.

The State of Oklahoma, in its Agreement with the Nation, acknowledged that "the Cherokee Nation has substantial interests in lands, water and other natural resources located within the Illinois River Watershed though the extent of those interests has not been fully adjudicated[.]"

Supplemental Filing, Agreement at p. 1.

The Nation's interest relating to the property was acknowledged and further defined in this Court's Opinion and Order from July 22, 2009. In that opinion, this Court recognized that "[w]hen the federal government set land apart in trust, it arguably reserved or recognized sufficient "reserved water rights" to fulfill the purposes of the land validly set apart in trust," and

also found that the Nation has “an arguable, non-frivolous claim it owns much of the surplus water within its historic boundaries.” Opinion and Order, July 22, 2009 10-11.

There can be little question that the Nation has claimed an interest in the waters of the IRW that are the subject of the action currently before the Court. The legislative body of the Cherokee Nation, the Tribal Council, has enacted statutes that define the waters of the Cherokee Nation as “all streams, lakes...and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon the Cherokee Nation or any portion thereof, and shall include under all circumstances waters which are contained within the boundaries of, flow through or border upon this Nation or any portion thereof.” The Tribal Council has also enacted numerous environmental laws, and set up the Environmental Protection Commission that has the authority to issue permits and levy civil penalties for violation of the Environmental Quality Code. 63 C.N.C.A. § 302(b)(7).

The Court must not only determine if the Nation has interest, but must also determine whether the Nation’s interest will be impaired or impeded by the case at bar. “The central concern in deciding whether intervention is proper is the practical effect of the litigation on the applicant for intervention.” San Juan County v. United States, 503 F.3d 1163, 1193 (10th Cir. 2007). Due to this Court’s ruling on July 22, 2009 that the Cherokee Nation is an indispensable party, the State’s natural resource damages claim under CERCLA and other damage claims were dismissed from the case. Unless the Cherokee Nation is allowed to intervene, there will not be a complete remedy for the pollution of the IRW in this case. The damages claims will not be addressed by the Court thus there will be no restoration of the natural resources injured by Defendants waste disposal practices, even if the State should prevail on all of its remaining

claims. Order at 22. The Nation, which has a significant claim to regulatory authority and ownership of the IRW, should be allowed to intervene to protect its interest and the interests of its citizens.

II. NO EXISTING PARTY CAN ADEQUATELY REPRESENT THE CHEROKEE NATION'S INTERESTS.

The Court must also consider whether some person or entity already a party may be able to adequately represent the interests of the proposed intervenor. Fed. R. Civ. P. 24(a)(2). The applicant for intervention bears the burden of showing that its interests cannot be adequately represented by another party. Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior, 100 F.3d 837, 844 (10th Cir. 1996). A presumption of adequacy of representation arises when the proposed intervenor and an existing party have the same ultimate goal. Id. at 845. To find that one party may not adequately represent the interest of the intervenor, the divergence of their interests need not be great. Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1255 (10th Cir. 2001). See also NRDC v. U.S. Nuclear Reg. Comm'n, 578 F.2d 1341 (10th Cir. 1978).

At various times, both parties have made arguments that put forward the interests of the Cherokee Nation. The Nation itself attempted to permit the State to represent its interests in this matter and pursue the Nation's claims to avoid the possible delay that its intervention as a party might create, though this Court later found that attempt unsuccessful. Order at 7. Further, the Court found that in light of "the State's and the Nation's disparate views relating to jurisdiction and ownership of lands and natural resources in Northeastern Oklahoma, this court is unpersuaded that the State can adequately protect the absent tribe's interest." As this Court has already held, there is no entity currently a party to this action that can adequately represent the interests of the Nation.

III. THE NATION'S MOTION TO INTERVENE IS TIMELY.

Timeliness under Fed. R. Civ. Pro. 24(b)(2) is a flexible standard that must be assessed in light of all the circumstances. Counties at 1250. There are no hard and fast rules that lay out how many days (or years) have to pass before a motion to intervene is untimely. In fact, the absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important factors to be considered. Id. at 1250 (citing Stupak-Thrill v. Glickman, 226 F.3d 467, 475 (6th Cir. 2000)).

Four factors that are considered when determining whether a motion to intervene is timely are: the length of time since the applicant knew or reasonably should have known of its interest in the case, any prejudice to the existing parties, any prejudice to the applicant, and the existence of unusual circumstances. Counties at 1250.

As to the first factor, whether the applicant knew or reasonably should have known of its interest in the case, the Nation is in an unusual position. While the Nation undoubtedly was aware of the litigation and knew that it had an interest in the IRW, it was not until the Defendant's filed their motion to dismiss based on failure to join a necessary party on October 31, 2008 and the Court rejected the validity of the Agreement between the Oklahoma and Cherokee Nation Attorneys General concerning the suit that the Nation's interests in obtaining timely protection of the IRW were more seriously jeopardized. It was not until July 22, 2009 when the Court's ruled on the Defendant's motion that the Nation was aware that it was necessary for it to seek intervention. Further complicating issues, prior to the ruling it was not clear that the Nation needed to participate in this matter. By finding that the Nation was an indispensable party, this Court put the Nation on notice that it was proper party to this litigation. See United Keetoowah Band v. United States, 480 F.3d 1318, 1324 (Fed. Cir. 2007) ("Rule

24(a)(2) was drafted as a ‘counterpart’ to Rule 19(a)(2) and . . . an applicant is entitled to intervene in an action when his interest is comparable to that of a person that is found ‘necessary’ under Rule 19(a)(2).”).

Neither party would be prejudiced by allowing the Cherokee Nation to intervene. There is a possibility for delay with the addition of a new party, but that delay causes little harm to the defendants, who are able to continue their business without hindrance. The possibility exists for some prejudice to the State, as the party seeking an injunction that would reduce the amount of phosphorus applied to the field, but that prejudice is offset by the assistance that the Nation could render as a co-plaintiff. Regardless, this Court is only called upon to determine whether the intervention itself will cause prejudice to the parties, not whether the delay in filing the motion to intervene causes prejudice. Utah Ass’n of Counties at 1251 (quoting Ruiz v. Estelle, 161 F.3d 814, 828 (5th Cir. 1998)).

The Nation’s intervention would also make any final adjudication of the claim binding on all parties, which would avoid piecemeal litigation that may lead to inconsistent judgments and unnecessary expense for all of the parties involved. This would ultimately benefit both parties and prevent any unnecessary expenditure of the Court’s resources.

The prejudice to the Nation if not allowed to intervene is substantial. Now that this Court has found that the Nation is an indispensable party for the CERCLA and damages claims asserted by the State there is little chance that the funding will be available to provide the restoration that the IRW needs. Without the Nation as a party and the claims that it can bring, an important resource will continue to diminish in quality and economic value.

CONCLUSION

This Nation is sensitive to the fact that this case has been going on for several years and the Nation's intervention comes only two weeks before trial. But this issue cannot be fully concluded until the Cherokee Nation is made a party. Unless the Nation is able to appear, assert its rights and defend its interests the meaningful settlement or adjudication of the claims brought by the State is not possible. If the Nation is permitted to intervene in this action, the case can finally be heard, settled, or otherwise brought to a conclusion.

CERTIFICATE OF SERVICE

I certify that on the 2nd day of September, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	
J. Randall Miller	rmiller@mkblaw.net
Louis W. Bullock	lbullock@bullock-blakemore.com
Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	
Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com

Motley Rice

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen
Patrick M. Ryan
Paula M. Buchwald
Ryan, Whaley & Coldiron, P.C.
Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Gordon D. Todd
Sidley Austin LLP
Robert W. George
Michael R. Bond
Erin Walker Thompson
Kutak Rock LLP

sjantzen@ryanwhaley.com
pryan@ryanwhaley.com
pbuchwald@ryanwhaley.com

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
gtodd@sidley.com

robert.george@tyson.com
michael.bond@kutakrock.com
erin.thompson@kutakrock.com

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables
Jennifer S. Griffin
Lathrop & Gage, L.C.

rtl@kiralaw.com
jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC
Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net
rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.
James M. Graves
Gary V. Weeks
Paul E. Thompson, Jr.
Woody Bassett
Jennifer E. Lloyd
Bassett Law Firm

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com
jgraves@bassettlawfirm.com
pthompson@bassettlawfirm.com
wbassett@bassettlawfirm.com
jlloyd@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod

jelrod@cwlaw.com

Vicki Bronson
P. Joshua Wisley
Conner & Winters, P.C.
Bruce W. Freeman
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

vbronson@cwlaw.com
jwisley@cwlaw.com
bfreeman@cwlaw.com

John H. Tucker
Leslie J. Southerland
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker & Gable
Terry W. West
The West Law Firm
Delmar R. Ehrich
Bruce Jones
Krisann Kleibacker Lee
Todd P. Walker
Faegre & Benson LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

jtuckercourts@rhodesokla.com
ljsoutherlandcourts@rhodesokla.com
chtucker@rhodesokla.com
thillcourts@rhodesokla.com
terry@thewesetlawfirm.com
dehrich@faegre.com
bjones@faegre.com
kklee@baegre.com
twalker@faegre.com

Michael D. Graves
D. Kenyon Williams, Jr.
COUNSEL FOR POULTRY GROWERS

mgraves@hallestill.com
kwilliams@hallestill.com

William B. Federman
Jennifer F. Sherrill
Federman & Sherwood
Charles Moulton
Jim DePriest
Office of the Attorney General

wfederman@aol.com
jfs@federmanlaw.com
charles.moulton@arkansag.gov
jim.depriest@arkansasag.gov

COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

griffithlawoffice@yahoo.com

Gary S. Chilton
Holladay, Chilton & Degiusti, PLLC
Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon, LLP
Robin S. Conrad
National Chamber Litigation Center, Inc.
COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND

gchilton@hcdattorneys.com
vschwartz@shb.com
csilverman@shb.com
rconrad@uschamber.com

THE AMERICAN TORT REFORM ASSOCIATION

Richard C. Ford
LeAnne Burnett
Crowe & Dunlevy

fordr@crowedunlevy.com
burnettl@crowedunlevy.com

COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins
McAfee & Taft
James D. Bradbury
James D. Bradbury, PLLC

richard.mullins@mcafeetaft.com
jim@bradburycounsel.com

**COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE
FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS
ASSOCIATION OF DAIRYMEN**

I also hereby certify that I served the attached documents by United States Postal Service,
proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
**COUNSEL FOR THE STATE OF
ARKANSAS AND THE ARKANSAS
NATURAL RESOURCES COMMISSION**

John E. and Virginia W. Adair Family Trust
Route 2 Box 1160
Stilwell, OK 74960

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Cary Silverman
Shook Hardy & Bacon LLP

600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

Cherrie House
P.O. Box 1097
Stilwell, OK 74960

David Gregory Brown
Lathrop & Gage LC (Jefferson City)
314 E High Street
Jefferson City, MO 65101
Donna S Parker
34996 S 502 Road
Park Hill, OK 74451

Doris Mares
14943 SE 15th Street
Choctaw, OK 73020-7007

G Craig Heffington
20144 W Sixshooter Road
Cookson, OK 74427

George R Stubblefield
HC-66, Box 19-12
Proctor, OK 74457

Gordon W. and Susann Clinton
23605 S Goodnight Lane
Welling, OK 74471

Jerry M Maddux
Selby Connor Maddux Janer
P.O. Box Z
Bartlesville, OK 74005-5025

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Jonathan D Orent
Motley Rice LLC (Providence)
321 S Main Street
Providence, RI 02940

Marjorie Garman

19031 US HWY 412
Colcord, OK 74338-3861

Randall E Kahnke
Faegre & Benson (Minneapolis)
90 S 7th Street, Suite 2200
Minneapolis, MN 55402-3901

Richard E Parker
34996 S 502 Road
Park Hill, OK 74451
Robin L. Wofford
Route 2, Box 370
Watts, OK 74964

Steven B Randall
58185 County Road 658
Kansas, OK 74347

Victor E Schwartz
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

William House
P.O. Box 1097
Stilwell, OK 74960

/s/ A. Diane Hammons